

July 29, 2013

Rod H. Coburn, D.D.S.
2571 W. Locust
Fresno, CA 93711

Re: Your Request for Informal Assistance
Our File No. I-13-082

Dear Mr. Coburn:

This letter responds to your request for advice regarding the gift provisions of the Political Reform Act (the "Act").¹ This letter is based on the facts presented. The Fair Political Practices Commission (the "Commission") does not act as a finder of fact when it renders assistance. (*In re Oglesby* (1975) 1 FPPC Ops. 71.) Because your question is general in nature, we are treating your request as one for informal assistance.² Also, please note that our advice is based solely on the provisions of the Act.

QUESTION

As a certified dental consultant, is a payment for you to attend a conference, in lieu of a stipend, at which you lead a continuing education course a gift under the Act?

CONCLUSION

Free admission and non-cash nominal benefits provided during the conference at which you will lead a continuing education course, as well as reasonably necessary travel, lodging, and subsistence, which satisfies the criteria for federal income tax deductions for businesses specified in Section 162 and 274 of the Internal Revenue Code, do not constitute gifts or prohibited honorarium under the Act. However, payments made for any of these purposes are considered income under the Act if the source is within your jurisdiction, is planning to do business within your jurisdiction, or has done business within your jurisdiction in the previous two years.

¹ The Political Reform Act is contained in Government Code Sections 81000 through 91014. All statutory references are to the Government Code, unless otherwise indicated. The regulations of the Fair Political Practices Commission are contained in Sections 18110 through 18997 of Title 2 of the California Code of Regulations. All regulatory references are to Title 2, Division 6 of the California Code of Regulations, unless otherwise indicated.

² Informal assistance does not provide the requestor with the immunity provided by an opinion or formal written advice. (Section 83114, Regulation 18329(c)(3).)

FACTS

You are an appointed Trustee of the Fresno County Employees' Retirement Association (the "FCERA"). The FCERA has a \$40,000,000 investment in a private placement partnership. The partnership sponsor hosted an educational meeting for existing investors in the Los Angeles area and planned to cover the costs of lodging and some meals, without a direct expense to the FCERA. The FCERA also planned to provide reimbursement for some meals and mileage. After seeking telephone assistance from the FPPC, you were informed that the payments by the private placement partnership should be considered gifts under the Act and subsequently declined to attend the meeting because the costs of the lodging and meals would exceed \$440. You have asked that we reconsider the previous telephone assistance.

Additionally, you seek advice regarding your continued participation at conferences during which you lead continuing education courses. As a dentist, you have retired from clinical practice but have maintained a dental benefit consulting business. As one of 128 certified dental consultants in the country, you are often asked to provide continuing education courses to dentists relative to dental treatment and corresponding dental benefits.

Although you decline any stipend, you would like to accept gratis attendance at the conference, which helps you to fulfill your own continuing education requirements for licensure in California.

ANALYSIS

You have asked that we reexamine telephone assistance previously provided regarding your attendance, as a trustee of the FCERA, at an "educational meeting for existing investors" sponsored by a "private placement partnership" in which your agency has invested agency funds. However, it is our understanding that the meeting has already occurred and reexamining the telephone assistance already provided is purely a hypothetical question at this time. Pursuant to Regulation 18329(b)(8)(D) and (c)(4)(D), it is the Commission's policy not to answer purely hypothetical questions.

If in the future you are offered the opportunity to attend a similar meeting, it is recommended that you seek written advice before the meeting, providing adequate time for a written response.³ If you have provided sufficient facts for formal written advice under Government Code Section 83114(b), you may expect a response within 21 working days.⁴ At

³ Telephone assistance is provided for the convenience of public officials and is advantageous in that it allows Commission staff to provide timely assistance for simpler and more frequent questions. However, telephone assistance has its limitations. More complex questions, such as the questions you have posed, are more suitable to written advice, which allows Commission staff adequate time to develop and examine the facts submitted. When telephone assistance is provided for an urgent complex question, advice is limited to a conservative answer erring on the side of caution.

⁴ The timeline may be extended for good cause (Gov. Code, § 83114(b)).

this time, we express no opinion regarding your assertion that the source of a payment for your attendance at the meeting should be considered the FCERA. We would need additional information to make this determination. Relevant factors include, but are not limited to, (1) whether the sponsoring entity has a contractual obligation to the FCERA to hold the meeting and (2) whether the meeting is paid for by funds that would otherwise constitute income to the sponsoring entity or investment income to the FCERA.

While we are unable to respond to your inquiry regarding your attendance at the prior meeting, we do proceed with assistance regarding your ongoing activities as a certified dental consultant and provider of continuing education courses.

Gift Provisions

The term “gift” is defined in Section 82028(a) as:

“Any payment that confers a personal benefit on the recipient, to the extent that consideration of equal or greater value is not received and includes a rebate or discount in the price of anything of value unless the rebate or discount is made in the regular course of business to members of the public without regard to official status.”⁵

In regard to free admission to the conference and nominal non-cash benefits you may receive during the event, you are receiving these payments in consideration for your services in leading a continuing education course. By definition, these payments are not gifts under the act since you are providing consideration. (See Section 82028 and 82030.) Moreover, while travel generally confers some personal benefit on a public official and may therefore constitute a gift to the official if consideration of equal or greater value is not received in return (*Gault* Advice Letter, No. A-07-158), Regulation 18950.1(e) states the following:

“A payment made for transportation, lodging and subsistence, which payment is reasonably necessary in connection with a bona fide business, trade, or profession, and which satisfies the criteria for federal income tax deductions for business expenses specified in Sections 162 and 274 of the Internal Revenue Code, is not an honorarium or gift unless the sole or predominate activity of the business, trade or profession is making speeches.”

Pursuant to Regulation 18932.2(b), an official is presumed to be engaged in the bona fide profession of teaching if:

“The individual receives payment teaching a course, presented to assist in the maintenance or improvement of professional skills or knowledge where the

⁵ Section 82044 defines payment, in part, as any “rendering of ... services or anything else of value, whether tangible or intangible.”

course provides credit toward continuing education requirements of the pertinent profession.”

Because leading the continuing education course is presumed to be in connection with a bona profession of teaching, payments for reasonably necessary travel, lodging, or subsistence made for your attendance at the conference, do not constitute a gift under the Act.

Honorarium Prohibition

In addition to the gift provisions, the Act also bans honorarium. Section 89502(a) provides that no “individual specified in Section 87200 shall accept any honorarium.”⁶ Section 89501(a) defines the term “honorarium” as “any payment made in consideration for any speech given, article published, or attendance at any public or private conference, convention, meeting, social event, meal, or like gathering.”

Nonetheless, subdivision (b) excludes from the honorarium ban:

“(1) Earned income for personal services which are customarily provided in connection with the practice of a bona fide business, trade, or profession, such as teaching, practicing law, medicine, insurance, real estate, banking, or building contracting, unless the sole or predominant activity of the business, trade, or profession is making speeches.”

Because you are presumed to be engaged in the bona fide profession of teaching in leading a continuing education course, free admission and non-cash nominal benefits provided during the event, as well as reasonably necessary travel, lodging, and subsistence, which satisfies the criteria for federal income tax deductions for businesses specified in Section 162 and 274 of the Internal Revenue Code, do not constitute prohibited honorarium under the Act. (Also see Regulation 18932.4(e) and Regulation 18950.1(e).)

Income Disclosure and Conflict of Interest Provisions

Section 82030 defines income under the Act providing the following in pertinent part:

“(a) ‘Income’ means, except as provided in subdivision (b), a payment received, including but not limited to any salary, wage, advance, dividend, interest, rent, proceeds from any sale, gift, including any gift of food or beverage, loan, forgiveness or payment of indebtedness received by the filer, reimbursement for expenses, per diem, or contribution to an insurance or pension program paid by any person other than an employer, and including any community property interest in the income of a spouse. . . . ‘Income,’ other than a gift, does not include income received from any source outside the jurisdiction and not doing

⁶ Section 87200 includes all “public officials who manage public investments.” As a trustee of the FCERA, you manage public investments and are therefore considered a Section 87200 filer under the Act.

business within the jurisdiction, not planning to do business within the jurisdiction, or not having done business within the jurisdiction during the two years prior to the time any statement or other action is required under this title.”

If the source of payments for your attendance at the conference is within your jurisdiction, is planning to do business within your jurisdiction, or has done business within your jurisdiction in the previous two years, payments are income under the Act. If the payments constitute income, the payments are subject to the Act’s reporting requirements and may give rise to a conflict of interest disqualifying you from making, participating in making, or using your position to influence a governmental decision if the decision will have a reasonably foreseeable material financial effect on the source of the income. (See Section 87200-87210 for disclosure provisions and Sections 87100-87500 for conflict-of-interest provisions.)

If you have other questions on this matter, please contact me at (916) 322-5660.

Sincerely,

Zackery P. Morazzini
General Counsel

By: Brian G. Lau
Counsel, Legal Division

BGL:jgl